No. 15459

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOE GRENIER,

Appellant,

vs.

JAMES W. HARLEY, Special Administrator with General Power of the Estate of Dan L. Harley, deceased,

Appellee.

Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLANT'S REPLY BRIEF.

GEORGE BOSHAE,
608 South Hill Street,
Los Angeles 14, California,
Attorney for Appellant.

The Myers Legal Press, Los Angeles. Phone VAndike 9007.

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Appellant welcomes appellee's reference to and the application of Rule 52a, F. R. C. P., inasmuch as the judicial construction of that rule by the Federal Appellate Courts seems to lend weight to and support the rule governing the California Appellate Courts with reference to appeals on grounds of insufficiency of the evidence. The rules enunciated by the California Courts are discussed on pages 11 and 12 of Appellant's Opening Brief.

An examination of the decisions construing that portion of Rule 52(a), F. R. C. P., providing that "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses," indicate that the courts rely largely upon the facts and evidence then before it for consideration.

The consolation which appellee is seeking by reference to Rule 52(a), *supra,* is clearly minimized if not entirely eliminated, if the rules declared by the cases cited by appellee and appellant herein are correctly applied to the present record on appeal.

> "Under Rule 52a of the Federal Rules of Civil Procedure, 28 U. S. C. A., the findings of the trial court must be sustained unless clearly erroneous. Where, however, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed, the finding is clearly erroneous and must be set aside. United States v. United States Gypsum Co., 333 U. S. 364, 68 S. Ct. 525, 92 L. Ed. 746."
>
> *Smyth v. Erickson,* 221 F. 2d 1.

Referring to Rule 52a, F. R. C. P., the opinion of the Court in *United States v. United States Gypsum Co.,* 333 U. S. 364, stated on pages 394 and 395:

> "That rule prescribes that findings of fact in actions tried without jury 'shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.' It was intended, in all actions tried upon the facts without a jury, to make applicable the then prevailing equity practice. Since judicial review of findings of trial courts does not have the statutory or constitutional limitations on judicial review of findings by administrative agencies or by a jury, this Court may reverse findings of fact, by a trial court where 'clearly erroneous.' The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial court when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court. *The find-*

ings were never conclusive, however. A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Italics ours.)

Shepherd v. Mahannah, 220 F. 2d 737, 739:

"The immediate question is whether the findings of the District Court are clearly erroneous. The findings of fact of a trial court are clearly erroneous within Rule 52 of the Federal Rules of Civil Procedure, 28 U. S. C. A., when (1) not supported by substantial evidence, (2) contrary to the clear preponderance of the evidence, or (3) based upon an erroneous view of the law. . . ."

Magidson v. Duggan, 212 F. 2d 748, 752;

States Steamship v. Permanente Steamship Corp., 231 F. 2d 82;

Reed v. Murphy, 232 F. 2d 668.

"Though the District Judge made findings of fact, conclusions of law and filed a memorandum, Rule 52, Federal Rules of Civil Procedure, 28 U. S. C. A., we are empowered to overturn his decision since the ultimate finding on which the judgment appealed rests is a conclusion of law, or a mixed one."

Chandler v. United States, 226 F. 2d 403.

The appellee in his brief, pages 4-5, as he did during the trial, evades the issue by interjecting considerable comment on the inability of the deceased to comprehend the nature of his acts in executing the deed to appellant. In view of the overwhelming evidence against appellee's contention to the contrary, a finding that the decedent was competent was unavoidable. [R. 17, 244, 253.]

The basic issue is: Was the delivery of the deed accompanied with donative intent? Appellant urges that it was.

In his feeble attempt to sustain the judgment of the trial court, appellee commences by citing Code sections and California cases in his brief (p. 6) which bear no factual similarity whatsoever to the present controversy.

It is respectfully submitted that the cases cited by appellee are inapplicable and that the pertinent legal principles were discussed and correctly applied in the factually analogous decisions cited in appellant's opening brief.

Appellee devotes almost two pages of his brief (pp. 7 and 8) relating to a discourse between the trial court and appellant's counsel, of the process employed in arriving at its conclusion. Obviously this is not a part of the record which would support any finding. Answering this phase of appellee's argument, the following comments appear controlling:

> "Appellee argues with much force that those findings resulted from inferences drawn by the District Court as to the intention of the parties, and not from any 'process of legal reasoning.' We do not agree, though the separation is difficult, and if we are mistaken in that respect, nevertheless, the evidentiary facts being without dispute, this Court is in substantially as good position as was the District Court to draw inferences and conclusions therefrom . . . In any event, on the entire evidence we are 'left with the definite and firm conviction that a mistake has been committed.' "
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> *Daniel v. First National Bank of Birmingham,* 228 F. 2d 803, 805.

> "The Appellees have urged that this court cannot upset the district court's findings on facilitation and

probable cause unless those findings are clearly erroneous. But we are not here bound by Rule 52a of the Federal Rules of Civil Procedure. As we said in Sears, Roebuck and Co. v. Johnson . . . 219 F. 2d 590, 591, '. . . In disturbing a district court's findings of basic facts, this court is guided by the 'clearly erroneous' provision of Rule 52(a). But Rule 52(a) is not applicable where, as here, the dispute is not as to the basic facts, but as to what inference (*i.e.,* ultimate fact) should reasonably be derived from the basic facts.' This court by examining the basic facts found by the district court can determine as advantageously as the district court can whether or not a reasonable inference can be drawn from the basic facts that the car facilitated the transportation and sale of narcotics, and that probable cause existed."

United States v. One 1950 Buick Sedan, 231 F. 2d 219, 223.

Irrespective of the trial court's questions as quoted on page 9 of appellee's brief, appellant reaffirms his content that the record is devoid of any evidence that the decedent heard the conversation between Mr. Edgar and Mr. Grenier or that the decedent understood the conversation. At most this observation would have been an inference from a conclusion. Conspicuous by its absence in appellee's brief is the testimony and the effect thereof of plaintiff's own witnesses in testifying that the decedent told them that he had deeded the property to appellant (without qualification) at a time when Dan L. Harley was able to and did express his intent and acts [R. 39] on June 18, 1955. Did the trial court arrive at its conclusion in the light of this testimony also?

Grasping at straws, appellee through his counsel has on pages 13 and 14 of his brief, alluded to a Superior

Court action supposedly litigated subsequent to the present appeal. Appellant is confident, without doubt, that this Honorable Court will not be misled by the impropriety of such a statement for obvious reasons. Appellee may have just as well advised this court that he is facing a contest of a very questionable (April 7th) will he is seeking to have admitted to probate purportedly executed by the decedent, Dan L. Harley, under the undue influence of appellee. All of which are not relevant to the present appeal.

Appellant's Witnesses.

In the concluding pages of appellee's brief, he relies upon the failure of a number of the appellant's witnesses in discussing the Montana property with decedent. May appellant respectfully direct the Court's attention to the fact that appellee made a major issue of the decedent's competency in executing the deed to appellant? To prove the decedent's competency, it became necessary to secure the testimony of witnesses who had known decedent, of both long and short duration. The fact that Dan Harley did not discuss his business affairs with everyone he knew, certainly attributed to him the qualities of a rational and sound business man.

With reference to Garnett Studebaker as a witness, appellee again demonstrates his "on the fence position." At the conclusion of plaintiff's case, appellee called Dr. Ogden as his witness [R. 132] at which time Dr. Ogden was not available. Appellant did call Dr. Ogden again and have him present for appellee at which time appellee refused to call him as their witness. [R. 193.] Similarly the appellee has adopted this attitude concerning Garnett Studebaker. Garnett Studebaker was just as available to appellee, if not more so, than appellant. The same pre-

sumption contended for by appellee against appellant on page 20 of his brief, could apply equally as forceful against appellee.

On page 9 of appellees' brief he states that the statement made by Mr. Edgar on July 16, 1955, to Mr. Grenier regarding the conveyance of the property to appellant [R. 42-43], were not denied by appellant. If appellee has examined the record with any degree of accuracy, he will observe that appellant did in effect deny any and all such statements made by Mr. Edgar, except that the conveyance was an unconditional gift [R. 230] to appellant.

Conclusion.

It is respectfully submitted that by the application of the rules announced by the authorities cited in this and appellant's opening brief pursuant to Rule 52(a), F. R. C. P., compel the conclusion that the findings of the trial court are clearly erroneous and that the record as a whole would warrant a definite and firm conviction that a mistake has been committed. The findings should be set aside and Judgment reversed.

Respectfully submitted,

George Boshae,

Attorney for Appellant.